

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BRIAN K. WOOD</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,461
<b>WTW DRILLING, LLC</b>	)	
Respondent	)	
AND	)	
	)	
<b>COMMERCE &amp; INDUSTRY INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the April 16, 2007, Order entered by Administrative Law Judge Bryce D. Benedict. The Board placed this appeal on its summary docket for disposition without oral argument. The parties presented their arguments in briefs filed with the Board.

**ISSUES**

In the April 16, 2007, Order, Judge Benedict granted claimant temporary total disability benefits from March 5, 2007, until either claimant is certified as having reached maximum medical improvement or he is released to substantial, gainful employment. In the same Order, the Judge directed respondent and its insurance carrier (respondent) to pay certain medical bills. But the Judge denied claimant's request for reimbursement for the medical expenses paid on claimant's behalf by the Kickapoo Nation Health Center.

In the April 16, 2007, Order, Judge Benedict also denied claimant's request for penalties.<sup>1</sup> The Judge stated he would not have entered an earlier order to pay temporary total disability benefits had the Judge known claimant had been released from medical treatment in April 2006 for noncompliance. In addition, the Judge found respondent was not obligated to pay claimant temporary total disability benefits under the earlier Order,

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<sup>1</sup> Because the April 16, 2007, Order addresses penalty issues under K.S.A. 44-512a, the order is final and, therefore, this appeal is considered by all five Board Members. See K.S.A. 2006 Supp. 44-555c and *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993).

which was dated July 6, 2006, when it learned from claimant's attorney that claimant had found employment. In the April 16, 2007, Order the Judge stated, in pertinent part:

The Court, on remand from the Board, on July 6, 2006[,] entered an order granting treatment with Dr. Teter and temporary total disability benefits. Unknown to the Court, the Claimant had been released from treatment by Dr. Teter the preceding April; at the preliminary hearing the Claimant presented medical records from Dr. Teter, but not the ones indicating he had been released for noncompliance. Had the Court known this no TTD [temporary total disability] benefits would have been awarded.

Within days of the Court's order the Respondent terminated TTD benefits after it was informed by Claimant counsel that the Claimant had found employment. By the terms of the Court's order this communication from Claimant counsel supported the termination of TTD benefits, and the Respondent was no longer under any order to provide TTD benefits.

In short, Judge Benedict denied claimant's request for penalties as respondent's obligation to pay temporary total disability benefits had been extinguished.

Claimant argues Judge Benedict erred. First, claimant contends the Judge exceeded his jurisdiction as he, in essence, retroactively modified the earlier July 6, 2006, Order for temporary total disability benefits and considered issues that were not before him. In that respect, claimant argues the July 6, 2006, preliminary hearing Order became final when it was not appealed but the April 16, 2007, Order eliminated some of the weeks of temporary total disability benefits that had accrued under the July 6, 2006, Order. Furthermore, claimant argues the April 11, 2007, hearing before Judge Benedict should have only addressed claimant's request for penalties and, therefore, the Judge did not have either the jurisdiction or authority to address any other matters. Accordingly, claimant contends the Judge should have limited his inquiry and the April 2007 Order to the issue of whether respondent failed to comply with the July 6, 2006, Order.

Claimant also challenges the Judge's findings that (1) claimant was released from medical treatment for being noncompliant and (2) under the terms of the July 2006 Order claimant's temporary total disability benefits terminated when claimant's attorney advised respondent's attorney that claimant had found employment in which he earned about \$1,000 for three days of work. Moreover, claimant argues he has not been certified as having reached maximum medical recovery nor released to return to work, as those terms were utilized in the July 6, 2006, Order.

In summary, claimant requests the Board to (1) order respondent to pay the temporary total disability benefits that were awarded in the July 6, 2006, Order; (2) order respondent to pay temporary total disability benefits for the period commencing

July 14, 2006, and continuing until either claimant reaches maximum medical improvement or he is released to substantial and gainful employment; and (3) grant his request for penalties for respondent's failure to comply with the July 6, 2006, Order.

Conversely, respondent requests the Board to affirm the April 16, 2007, Order. First, it contends the April 16, 2007, Order did not retroactively modify the earlier July 6, 2006, preliminary hearing Order. Second, it contends the April 16, 2007, Order was issued based upon claimant's application for a preliminary hearing and, therefore, claimant is mistaken if he believes the April 2007 Order should be considered only as a final order for penalties.

Next, respondent argues claimant was released from medical treatment by his authorized doctor in April 2006 and his return to work in July 2006 terminated his right to temporary total disability benefits according to the language of the July 6, 2006, Order. Finally, respondent asserts that it attempted to resolve the issue of claimant's temporary total disability benefits in February 2007, when the parties appeared for a hearing that was scheduled to address respondent's motion to terminate benefits and claimant's attorney allegedly stated that no temporary total disability benefits were being requested at that time. Consequently, respondent requests the Board to affirm the April 16, 2007, Order and relieve it from further payment of temporary total disability benefits and medical benefits.

The issues before the Board on this appeal are:

1. Did the April 16, 2007, Order retroactively modify the temporary total disability benefits previously awarded in the July 6, 2006, preliminary hearing Order?
2. Did the Judge properly deny claimant's request for penalties on the basis that claimant's return to work in July 2006 terminated his right to receive temporary total disability benefits under the language of the July 6, 2006, Order?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date, the Board finds:

1. Claimant alleges he injured his back and knees on October 5, 2005, while working for respondent. The course of claimant's recovery could be described as unfortunate. Claimant first underwent open reduction internal fixation surgery to repair a fracture in his left patella. Because of an infection, he next had surgery to remove the hardware used in the first surgery. To further complicate matters, claimant has a history of diabetes, hypertension, and alcohol abuse.

2. In a May 4, 2006, preliminary hearing Order, Judge Benedict denied claimant's request for workers compensation benefits. That preliminary hearing Order was appealed to this Board. By Order dated June 30, 2006, the Board Member who was assigned to review the May 4, 2006, preliminary hearing Order found claimant had established by the barest of margins that he had injured his left knee working for respondent. Consequently, the May 4, 2006, Order was reversed and this claim was remanded to the Judge to further address claimant's request for preliminary hearing benefits.
3. On July 6, 2006, Judge Benedict issued a preliminary hearing Order in which temporary total disability benefits were ordered paid at \$400 per week commencing October 6, 2005, and continuing "until [claimant is] certified as having reached maximum medical improvement; or [claimant is] released to substantial and gainful employment." The Judge also ordered the payment of medical mileage and authorized medical treatment from Dr. Teter.
4. On July 7, 2006, claimant mailed a Demand for Compensation to respondent's attorney and respondent's insurance carrier, AIG. That document demanded temporary total disability benefits for the period from October 6, 2005, through July 5, 2006. There is no dispute those temporary total disability benefits have now been paid. Also, on July 7, 2006, claimant's attorney advised respondent's attorney that claimant had returned to work as of July 6, 2006.

I am advised that my client's first day of working post accident was 7/6/06 when he resumed computer contract work.

We compute \$400.00 a week from 10/6/05 thru 7/5/06 to be \$15,600.00 (39 weeks @ \$400.00). Please have your client make payment promptly and also the mileage of \$569.60.<sup>2</sup>

5. On November 20, 2006, respondent's attorney wrote claimant's attorney to advise respondent was going to request a preliminary hearing to terminate claimant's benefits under K.S.A. 44-518 because claimant had refused to submit to a medical examination by Dr. Fevurly. On December 8, 2006, respondent filed an Application for Preliminary Hearing with the Division of Workers Compensation. The Division scheduled a preliminary hearing for February 6, 2007.
6. Meanwhile, on December 5, 2006, claimant went to the Horton Clinic and reported severe left knee pain. Claimant had a left knee x-ray, which indicated he had a

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<sup>2</sup> July 7, 2006, letter from claimant's attorney to respondent's attorney attached to Answer to Claimant's Request for Penalties (filed Feb. 20, 2007).

nonunion of a comminuted patella fracture. Claimant was scheduled to see Dr. Teter, told to keep his diabetes in good control, and encouraged to discontinue consuming alcoholic beverages. Claimant then missed the December 14, 2006, and January 5, 2007, appointments with Dr. Teter and did not telephone to postpone or reschedule the appointments.

7. On January 22, 2007, claimant's attorney wrote respondent's attorney to inquire whether Dr. Teter would be authorized to evaluate and treat claimant. Claimant's attorney noted he would present the issue of Dr. Teter's authorization at the February 6, 2007, preliminary hearing. In addition, claimant's attorney advised respondent's attorney that the January 22, 2007, letter should be considered the requisite notice of intent to request a preliminary hearing. Consequently, on January 30, 2007, claimant filed an Application for Preliminary Hearing with the Division of Workers Compensation.
8. On February 1, 2007, claimant's attorney mailed a request for penalties to opposing counsel. The next day, February 2, 2007, the request was filed with the Division of Workers Compensation. That request for penalties was premised upon respondent's failure to comply with the July 6, 2006, Order. In the request for penalties, claimant's attorney noted compensation due as of February 1, 2007, was temporary total disability benefits for the period from July 5, 2006, through February 1, 2007, plus weekly benefits thereafter until claimant was certified as reaching maximum medical improvement.
9. Claimant saw Dr. Teter on February 6, 2007, and the doctor performed an open reduction internal fixation on claimant's left knee and an iliac crest bone graft on March 5, 2007. The doctor planned on keeping claimant in a straight leg long-leg cast for about six weeks as claimant was somewhat noncompliant with the splint the doctor used following the first surgery. At claimant's follow-up visit with Dr. Teter on March 23, 2007, the doctor noted claimant had "kind of destroyed his long-leg cast, so a new one had to be applied . . . ."<sup>3</sup>
10. Respondent's attorney represents the parties appeared for the scheduled February 6, 2007, preliminary hearing to address respondent's request to terminate benefits. Furthermore, respondent's attorney contends the Judge did not enter an order because claimant's attorney allegedly stated claimant was not claiming any temporary total disability benefits at that time. Unfortunately, no record was made of the February 6, 2007, proceedings or announcements. But Judge Benedict wrote the attorneys on February 7, 2007, advising the following:

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<sup>3</sup> M.H. Trans., Cl. Ex. 1.

I advised the parties at our meeting on February 6 that Dr. Teter remained the authorized treating physician. It is his decision to treat the Claimant or to decline to do so. Dr. Fevurly was only authorized for an IME and not to be a treating physician.

Although this was not discussed, if it happens that Dr. Teter declines to treat the Claimant due to some non-medical reason, it would probably make sense to provide an alternate treater.

11. On February 23, 2007, claimant mailed a Demand for Compensation to respondent's attorney and respondent's insurance carrier, AIG. In that document, claimant demanded temporary total disability benefits for the period from July 14, 2006, through February 26, 2007, plus weekly benefits thereafter per the Judge's order.
12. On March 21, 2007, claimant's attorney mailed a request for penalties to respondent's attorney. The request was filed with the Division of Workers Compensation on March 22, 2007. That request for penalties was premised upon respondent's failure to comply with the July 6, 2006, Order. In the request for penalties, claimant's attorney noted compensation due as of March 21, 2007, was temporary total disability benefits for the period from July 14, 2006, through March 21, 2007, plus weekly benefits thereafter until claimant was certified as reaching maximum medical improvement.

#### **CONCLUSIONS OF LAW**

The Board concludes the April 16, 2007, Order should be affirmed. The July 6, 2006, preliminary hearing Order required respondent to pay claimant temporary total disability benefits until claimant was "certified as having reached maximum medical improvement; or [claimant was] released to substantial and gainful employment." Judge Benedict found respondent's obligation to pay claimant temporary total disability benefits was extinguished when claimant's attorney advised respondent that claimant had returned to work.

The majority of the Board agrees. Whether Judge Benedict determined that returning to work was tantamount to being released to return to work as stated in the July 6, 2006, Order or that estoppel now prevents claimant from claiming temporary total disability benefits after his attorney reported claimant had returned to work, the result is the same. Consequently, the Board affirms the Judge's denial of the request for penalties.

Claimant has argued the Judge retroactively modified the July 6, 2006, Order. The Board disagrees as it is apparent the Judge denied claimant's request for penalties and

the request for temporary total disability benefits for the period in question because of claimant's return to work, albeit a temporary one. The Board rejects claimant's argument that the Judge retroactively modified the July 6, 2006, Order. Instead, the Judge merely interpreted the July 6, 2006, Order in light of the facts and determined that no temporary total disability benefits were due under that Order.

**WHEREFORE**, the Board affirms the April 16, 2007, Order entered by Judge Benedict.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

We respectfully disagree with the majority. The July 6, 2006, Order is explicit that only two circumstances automatically terminate claimant's temporary total disability benefits – claimant being certified as having reached maximum medical improvement and claimant being released to return to substantial, gainful employment. Neither of those conditions occurred.

Respondent should not be permitted to determine unilaterally when it will comply with an Order. Accordingly, we find that respondent failed to comply with the July 6, 2006, Order and that under the terms of that Order claimant is entitled to receive temporary total disability benefits until it was modified in the April 16, 2007, Order. Whether claimant was actually temporarily and totally disabled during the period awarded, however, is an issue that can be raised at final award and addressed accordingly.

Nonetheless, we would only assess a nominal sum against respondent in penalties. These facts do establish extenuating circumstances as there was confusion regarding claimant's employment status and his ability to work. Moreover, after the payment of temporary total disability benefits for the initial period from October 2005 through early July 2006, there appears to be a significant period before claimant acted to reinstate those benefits. In short, it appears claimant's conduct or inaction contributed to the situation.

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge